

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

TOMMY STEWART

APPELLANT

V.

NO. 2010-KA-1471-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF OF THE APPELLANT

MISSISSIPPI OFFICE OF INDIGENT APPEALS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this court may evaluate possible disqualifications or recusal.

1. State of Mississippi
2. Tommy Stewart, Appellant
3. Honorable Dee T. Bates, District Attorney
4. Honorable Michael M. Taylor, Circuit Court Judge

This the 4th day of January, 2011.

Respectfully Submitted,

MISSISSIPPI OFFICE OF INDIGENT APPEALS

BY:


W. DANIEL HINCHCLIFF
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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
FACTS	1
STATEMENT OF COUNSEL	5
CONCLUSION	7
CERTIFICATE OF SERVICE	8

TABLE OF AUTHORITIES

STATE CASES

<i>Lindsey v. State</i> , 939 So. 2d 743 (Miss. 2005)	5
<i>Patton v. State</i> , 24 So.3d 563 (Miss. 2010)	5

RULES

U.C.C.C.R. 8.05	5
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STATEMENT OF THE ISSUES

None

STATEMENT OF THE CASE

This appeal proceeds from the Circuit Court of Lincoln County, Mississippi, and a judgement of conviction against Tommy Stewart for the crimes of aggravated assault and shooting into a dwelling following a jury trial commenced on June 15, 2010, Honorable Michael Taylor, Circuit Judge, presiding. Tommy Stewart is currently incarcerated in an institution under the supervision of the Mississippi Department of Corrections.

FACTS

In an *in camera* proceeding prior to the commencement of trial and impaneling of the jury, Appellant Tommy Stewart with his appointed counsel, requested the court grant him a continuance as his wife was scheduled to have a caesarian section two days hence. Tommy Stewart further informed the court, that if not granted a continuance he desired to represent himself. (T. 2-4) The trial judge ascertained that Tommy Stewart did desire the presence of his counsel to help him

represent himself. (T. 5) The court, after making some preliminary remarks to Tommy Stewart advising that motivation is not equal to training and experience in the practice of law, advised Tommy Stewart they would further address his stated desire to represent himself after qualifying the jury.

After the jury panel was qualified, the court conducted an inquiry into Tommy Stewart's request to waive representation and act as his own counsel (T. 26) He was informed that he was entitled to have an attorney at no expense, that if he chose he could have counsel to assist him to whatever extent he chose; but, that the rules and decorum would not be relaxed just because he represented himself, and that, if he chose to represent himself, the likelihood of an unfavorable outcome would increase. After the trial court ascertained that Tommy Stewart understood both his rights and the risks, Tommy Stewart told the court he wanted to represent himself, with his assigned counsel available to advise him. He specifically wanted to cross examine the State's witnesses and to make argument. (T. 26-40) Voir dire was conducted pro se. (T. 83-87)

After the State made it's opening statement, Tommy Stewart made his opening statement. Part of his opening was that he had turned down the prosecution's plea offer. (T. 105-106) Otherwise, he said he would prove the State's witnesses' were "telling a fib." (T. 106)

First to testify was Bobby Bell, an investigator with the Brookhaven Police Department. On October 29, 2008 he was dispatched to Smith Apartments. (T. 106) While there he observed a bullet hole in the window of apartment 29 then occupied by J. W. Bryant. (T. 107) The hole in the window was aligned with another bullet hole on an inside wall in the kitchen. (T. 110) He also observed a bullet hole in the vehicle driven by Tanja Jackson. (T. 112) Bell began looking for Tommy Stewart, but he was not located for six months. (T. 113-114)

Pro se cross examination brought out that Tommy Stewart should have been easy to locate as he was in jail “for several misdemeanors” at the time. (T. 115) Investigator Bell agreed that he had not seen the vehicle with the bullet hole at the scene, but at the police department. At that point Tommy Stewart announced that he had “some valuable information that’s detrimental (sic) to my case that’s in my car...” (T. 117) After Investigator Bell agreed that Curtis Jackson, the alleged victim of the aggravated assault charge, made his statement at the police department, and not at the scene, Stewart attempted to introduce that statement into evidence. An objection by the State was sustained. (T. 128-130) Tommy Stewart then elicited that Jackson had named him, Tommy Stewart, as the person that shot at him (T. 131). Bell agreed he had not done a photo line up, but had based his warrant upon the identification of Stewart made by Jackson. Jackson had named Tommy Stewart and said that they were related. (T. 131-133) A question by Tommy Stewart about officer Bell relying on the word of a “convicted felon” was objected to, and the jury instructed to disregard that. (T. 133) Cross examination further revealed that Investigator Bell had also taken Tonja Jackson’s statement, and had taken a photo graph of the hole in J. W. Bryant’s window. (T. 134)

Redirect iterated that no photo lineup was done because Curtis Jackson had known Tommy Stewart since they were kids. (T 136)

Curtis Jackson took the stand, reiterating that he knew Stewart, though the relationship was not personal (T. 136) Predicate was not laid, but Curtis Jackson told the jury that Tommy Stewart was having a phone conversation with Jackson’s cousin, Albert Stewart. Tommy Stewart was telling Albert that Albert was “gonna pay” him. (T. 137-138) Later Albert got another phone call from a person Curtis believed to be Tommy Stewart because the conversation was an argument over money. (T. 138) Curtis Jackson picked up his sister Tonja Jackson and went to their aunties, (Christy Stewart) house at Smith Apartments. (T. 139) They were in a car rented by Tonja. Christy Stewart

and Tonja were going up the stairs, leaving Curtis on the ground, when Tommy Stewart came by in a Ford Explorer, saying “this and that.” Curtis told Tommy Stewart “that ain’t got nothing to do with me” and Tommy left. However, Tommy came back on foot and “aimed his pistol and he start shooting.” (T. 140) Curtis Jackson testified that Tommy Stewart pointed the pistol “[t]owards me, in my direction.” (142) As he heard the first shot, Curtis dropped to the ground” right behind his sister’s rented car. After the shooting, the others came out and Tonja called the police. (T. 142-143)

Cross examination by Tommy Stewart added the following facts. Curtis did not recall what Tommy was wearing. Chris Dawson had been in the Ford Explorer with Tommy. Curtis and Tommy were not related. The group left the scene before calling the police and Tonja called the police because the car she rented was hit. Curtis did not think it was Tommy shooting, he knew it was Tommy. Curtis did not see the shot that hit the dwelling. (T. 144-157) While the State at first objected to Stewart reading Curtis Jackson’s statement, it withdrew the objection and the statement was read. (T. 149-150)

On redirect, Curtis Jackson testified that he heard three shots in a row, “[p]ow, pow, pow.” (T. 158)

J. W. Bryant was at the stove cooking in his apartment when he heard shots, one of which came through his kitchen window. He identified a picture of the hole in his window, though his recollection was that he lived in apartment 15. He also pointed out the hole in his wall. (T. 159-161) Mr. Bryant told Tommy Stewart that he did not know him, but that he was familiar with Curtis “Blow” Jackson and that he talked to the police that night. He believed he lived in apartment 15. (T. 162-163) After redirect, where he identified his apartment as the one in the picture with the bullet hole, the defense was denied re-cross to enforce the confusion over the apartment number, the trial court holding the point had already been made.

Tonja Jackson was Curtis Jackson's sister. On October 29, 2008, she went to the Robert Smith Apartments to her aunt's home, driving her white rental car. J. W. Bryant was her aunt's neighbor. She had gone to the aunt's apartment, leaving Curtis on the street.. She heard arguing, then shots.(T. 165-169) She looked and saw Tommy Stewart running. (T. 170) She called the police.(T. 172)

On cross examination she explained she heard shots and went to the window. Two shots hit her car. Her statement was that "shots hit the car she was in" and that her aunt looked out the window. (T. 177) She told Tommy Stewart, "I know I saw you running." She had seen him earlier and he had also come to her house after the incident, to apologize. (T. 179-185)

The State rested, and after being properly advised, Tommy Stewart chose to not testify and did not put on further proofs. The jury returned it's verdict of guilty to both counts.

STATEMENT OF COUNSEL

1. I, counsel for the Appellant, hereby represent to the Court, pursuant to *Lindsey v. State*, 939 So. 2d 743 (Miss. 2005), that counsel diligently searched the procedural and factual history of this criminal action and scoured the record searching for any arguable issues which could be presented to the Court on Appellant Tommy Stewart's behalf in good faith for appellate review, and upon conclusion, have found none.

2. The matters considered, reviewed and included in counsel's search were: (a) the reason for the arrest and circumstances surrounding the arrest of Tommy Stewart; (b) any possible violation of Tommy Stewart's right to counsel, specifically including the understanding of Appellant Tommy Stewart of his right to represent himself and the dangers thereof, and of the trial courts compliance and proper application of U.C.C.C.R. 8.05 and *Patton v. State*, 24 So.3d 563 (Miss. 2010); (c) the entire trial transcript; (d) all rulings of the trial court; (e) possible prosecutorial misconduct; (f) all

CORRECTED CERTIFICATE OF SERVICE

I, W. Daniel Hinchcliff, Counsel for Tommy Stewart, do hereby certify that I have this day caused to be mailed via United States Postal Service, First Class postage prepaid, a true and correct copy of the above and foregoing **BRIEF OF THE APPELLANT** to the following:

Honorable Michael M. Taylor
Circuit Court Judge
Brookhaven, MS 39602

Honorable Dee T. Bates
District Attorney, District 14
284 East Bay Street
Magnolia, MS 39652

Honorable Jim Hood
Attorney General
Post Office Box 220
Jackson, MS 39205-0220

Mr. Tommy Stewart, MDOC ##W0413
Yazoo County Regional Correctional Facility
154 Roosevelt Hudson Drive
Yazoo City, MS 39194

This the 5th day of January, 2011.


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